IN THE

Supreme Court of the United States

October Term, 1978

No. 78-10

CHARLES O. FINLEY & CO., INC.,
an Illinois Corporation,
Petitioner,

v.

BOWIE K. KUHN,
Commissioner of Baseball, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT BOWIE K. KUHN IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, at the request of a major league baseball club seeking review of a ruling by the Commissioner of Baseball, this Court should overturn its decisions in *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); and *Flood v. Kuhn*, 407 U.S. 258 (1972), holding that the business of professional baseball is not within the scope of the federal antitrust laws unless and until Congress determines otherwise?

2. Whether the Court of Appeals was correct in holding that the district court made adequate findings as to the

fairness of the Commissioner's procedures where the district court expressly found that after providing written notice to all interested parties, the Commissioner held a full, fair and transcribed hearing and wrote a reasoned decision, which the district court held to be "duly" taken and neither arbitrary nor capricious?

3. Whether the Court of Appeals was correct in holding that the district court in this non-jury trial did not err when it limited the cross-examination of a witness by refusing to permit questions which were beyond the scope of direct and which were fully covered in the witness' deposition testimony which had been earlier admitted in evidence?

4. Whether the Court of Appeals correctly interpreted Illinois common law when it affirmed the district court's declaratory judgment that a covenant not to sue the Commissioner of Baseball — adopted voluntarily, intelligently and knowingly by the parties to the Major League Agreement — is valid and may be enforced, with certain exceptions, in the future?

STATEMENT OF THE CASE

Petitioner seeks review of the Court of Appeals' unanimous affirmance of a judgment by the district court (McGarr, J.) holding that the Commissioner of Baseball acted reasonably and within the scope of the express contractual authority granted him by the Major League Agreement[1] and the Major League Rules[2] when he reviewed

[1]The Major League Agreement, a contract among the 26 Major League clubs, provides in pertinent part that the Commissioner of Baseball shall have the power:

> "to investigate . . . any act, transaction or practice charged, alleged or suspected to be not in the best interests of the national game of baseball . . . [and] [t]o determine . . . what preventive, remedial or punitive action is appropriate in the premises and to take such action . . . ." (Trial Exhibit K-1; Findings of Fact, Appendix to Petitioner's Petition for Writ of Certiorari, p. 51 [hereinafter cited as "App., p. __"].

[2]Major League Rule 12(a), promulgated by the Major League clubs pursuant to the Agreement, provides that no assignment of a player contract:

> "shall be recognized as valid unless within 15 days after execution a counterpart [of the] original shall be filed . . . and *approved by the Commissioner.*" (Trial Exhibit K-2; Findings of Fact, App., p. 52.) (Emphasis added.)

and disapproved petitioner's proposed assignments of player contracts. *Charles O. Finley & Co. v. Kuhn,* 569 F.2d 527 (7th Cir. 1978).

The facts underlying this suit are as follows: In the middle of the 1976 baseball season, petitioner, the owner of a Major League baseball club and a signatory to the Major League Agreement, proposed to assign the contracts of three players for cash to two pennant-contending clubs in petitioner's league. (Findings of Fact, App., p. 53.) Acting pursuant to the Major League Agreement and Rules, Baseball Commissioner Bowie K. Kuhn issued written notice of a hearing at which all interested parties had the opportunity, with the assistance of counsel, to present and examine witnesses, introduce evidence and make arguments in support of their respective positions as to whether these assignments were "in the best interests of baseball." (Trial Exhibits K-55, K-56; Findings of Fact, App., pp. 66-67.) Following the transcribed hearing, the Commissioner issued a written decision setting forth his reasons for disapproving the proposed assignments as "not in the best interests of baseball." (Trial Exhibit K-67; Findings of Fact, App., pp. 67-68.)

Thereafter, petitioner filed suit in the United States District Court for the Northern District of Illinois. Its principal claim was that the Major League Agreement did not authorize the Commissioner to disapprove assignments of

player contracts. The complaint further alleged that even if respondent Kuhn had the authority under the Agreement to disapprove such transactions, his decision was *ultra vires* because it was arbitrary, capricious and issued in bad faith. In separate counts, the complaint also alleged that the Commissioner's decision was the result of a conspiracy among all of the other Major League clubs in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1976), and that the Commissioner's decision constituted state action which violated petitioner's right to due process and equal protection of the laws under the United States Constitution.

Prior to trial, the district court dismissed the antitrust, due process and equal protection counts on the ground that they failed to state a valid claim for relief.[3] The district court held that the business of baseball was not subject to the Sherman Act, relying on this Court's decisions in *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (*per curiam*), *reh. den.*, 346 U.S. 916 (1953); and *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922). (Memorandum Opinion and Order With Respect to Defendant Kuhn's Motion for Summary Judgment, App., pp. 46-47.)

After extensive pretrial discovery, the case was tried to the court, sitting without a jury, in December 1976 and January 1977. The trial consumed 15 days and involved the live testimony of 20 witnesses and thousands of pages of exhibits. At trial, the witnesses testified (and the exhibits related) to the background of the adoption of the Major League Agreement, the manner in which the clubs drafted

[3]Petitioner did not appeal to the Court of Appeals the district court's ruling that the complaint failed to state a valid claim for relief under the due process or equal protection clauses of the United States Constitution.

the language of the Agreement, the actions taken by the parties and the Commissioner pursuant to the Agreement since its adoption in 1921, the reliance of the parties on prior judicial interpretation of the language, and the intent of the present signatories in executing the Agreement. The trial also explored in depth the procedures followed by the Commissioner in this case as well as the validity of the Commissioner's reasons for disapproving the proposed assignments.

On March 17, 1977, in a decision supported by extensive and detailed findings of fact and conclusions of law, the district court concluded that Article I, Section 2 of the Major League Agreement and Rule 12(a) of the Major League Rules authorized the Commissioner to disapprove petitioner's proposed assignments and that the Commissioner's decision was reasonable and issued in good faith. Accordingly, the court entered judgment for respondent Kuhn.

After judgment was entered against petitioner on its claims, respondents Kuhn and the Boston Red Sox moved for judgment on their counterclaims, which alleged that by bringing suit petitioner had breached Artitcle VII, Section 2 of the Major League Agreement. In this provision, petitioner and the other signatories to the Major League Agreement had covenanted to abide by the decisions of the Commissioner and expressly waived their right to challenge any of his decisions in court.[4] In reliance upon the record evidence, the district court found that the covenant not to sue "is clear and the results clearly intended" (Memoran-

[4]Article VII, Section 2 provides:

> "The major leagues and their constituent clubs, severally agree to be bound by the decisions of the Commissioner, and the discipline imposed by him under the provisions of this Agreement, and severally waive such right of recourse to the courts as would otherwise have existed in their favor." (Trial Exhibit K-1; Findings of Fact, App., p. 52.)

dum Opinion and Order With Respect to Defendants' Counterclaims, App., p. 80) and issued a declaratory judgment that Article VII, Section 2 is a valid covenant not to sue which petitioner had breached by filing this suit. The court concluded that this provision could be enforced in the future, but in the exercise of its discretion, the court declined to assess damages against petitioner.[5]

On petitioner's appeal, the United States Court of Appeals for the Seventh Circuit affirmed in all respects, holding unanimously that the evidence "fully supports, and we agree with" the district court's determination that Commissioner Kuhn was "given the express power to approve or disapprove the assignments of players" and that the Commissioner's decision in this case was reasonable and made in good faith. (569 F.2d at 534, 538.) The Court of Appeals also unanimously upheld the district court's ruling dismissing the antitrust count, noting that "the Supreme Court has held three times that 'the business of baseball is exempt from the federal antitrust laws.'" (*Id.* at 541.) The Court of Appeals also carefully considered and rejected petitioner's contentions that (1) the district court failed to make express findings concerning the fairness of the Commissioner's procedures, and (2) the district court had erred in limiting petitioner's cross-examination of Commissioner Kuhn to the scope of his direct examination. (*Id.* at 540.)

The Court of Appeals also affirmed, on the basis of Illinois common law, the district court's declaratory judgment holding that the covenant not to sue in Article VII, Section 2 of the Major League Agreement is valid and

[5]Respondents took no appeal from the district court's decision not to award damages for petitioner's breach of contract.

may, in the future, be enforced.[6] (*Id.* at 543.) Since the claim seeking the declaratory judgment had been founded on diversity of citizenship jurisdiction, the Court of Appeals examined the applicable conflicts of laws principles and concluded that the substantive law of Illinois, where the Major League Agreement had been executed, controlled the issue of the enforceability of the covenant. In reliance upon a consistent line of authority by the Supreme Court of Illinois, the Seventh Circuit held that the covenant in the Major League Agreement simply reiterated the Illinois common law of nonreviewability of private association actions and was fully consistent with Illinois and federal public policy. The Court of Appeals also held that enforceability of the covenant in the future would be subject to certain enumerated exceptions, none of which would have been applicable had the covenant been enforced in this case. (*Id.* at 544.)

ARGUMENT

The petition for a writ of certiorari asks this Court (1) to reconsider Baseball's exemption from the federal antitrust laws, which this Court has consistently, and as recently as 1972, upheld in the absence of contrary Congressional legislation; (2) to review two relatively minor and wholly inconsequential procedural rulings by the district court which were unanimously affirmed by the Court of Appeals; and (3) to review a question of state common law, which raises neither a Constitutional nor a federal law issue. Manifestly, no important question of federal law or other circumstance is presented that warrants review by this Court.

[6]In a concurring opinion, Chief Judge Fairchild stated that in his view the covenant might not be enforceable under Illinois common law. (569 F.2d at 545-546) Joining in the majority opinion in all other respects, Chief Judge Fairchild wrote that he would limit the force of the covenant to an indication of the extremely limited scope of judicial review of the Commissioner's actions intended by the parties to the Major League Agreement. (*Id.*).

I. THIS COURT HAS CONSISTENTLY HELD, AS RECENTLY AS 1972, THAT THE BUSINESS OF BASEBALL IS NOT SUBJECT TO THE FEDERAL ANTITRUST LAWS, UNLESS AND UNTIL CONGRESS DETERMINES OTHERWISE

On three separate occasions, and as recently as 1972, this Court has ruled that "the business of baseball" — including its fundamental and structural agreements and player control arrangements — is exempt from the federal antitrust laws. *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (*per curiam*) *reh. den.*, 346 U.S. 916 (1953); *Federal Baseball Club of Baltimore, Inc. v. National League*, 259 U.S. 200 (1922). As the Court concluded in *Toolson*, "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." 346 U.S. at 357.

Against this background, and in the absence of any intervening Congressional legislation on this subject, petitioner's plea that this Court should once again consider a question it has thoroughly and definitively resolved on three prior occasions can only be regarded as frivolous.

Petitioner, a major league club owner which came into baseball long after the antitrust exemption had been established and reiterated, bases its plea for Supreme Court review on a contrived and implausible reading of *Federal Baseball*, *Toolson* and *Flood*. Specifically, petitioner argues that the Court intended to hold not the business of baseball, but only its "reserve system," to be exempt from the antitrust laws. This argument is untenable. It is contradicted by the repeated, unequivocal language in the Court's three decisions, the facts on which those decisions rested, and the unanimous interpretations by the lower federal courts of this Court's holdings that the entire

"business of baseball" — not simply the reserve system — is exempt from the antitrust laws.[7]

In *Federal Baseball*, plaintiff baseball club sued the two major leagues, contending, among other things, that the refusal of the two leagues to permit plaintiff to play games against the leagues' teams constituted a boycott in violation of the Sherman Act. In an opinion by Mr. Justice Holmes, the Court rejected plaintiff's claims on the ground that professional baseball is not within the scope of the federal antitrust laws. (259 U.S. at 208-09.)

In *Toolson*, the Supreme Court again ruled that the antitrust laws were inapplicable to professional baseball. (346 U.S. at 357.) *Toolson* was decided together with two companion cases, *Kowalski v. Chandler* and *Corbett v. Chandler*. In *Corbett*, plaintiff alleged that many aspects of professional baseball's structure violated the antitrust laws, including, *inter alia*, the Major League Agreement which, according to plaintiff, deprived the Pacific Coast League of Major League status and unreasonably restricted the number and location of Major League franchises. (346 U.S. at 363-64) (Burton, J. dissenting). After considering all three cases, the Court stated:

> "In *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), this Court held that the *business of providing public baseball games* for profit between clubs of professional baseball players *was not within the scope of the federal an-*

[7] *See, e.g., Portland Baseball Club, Inc. v. Kuhn*, 368 F. Supp. 1004, 1007 (D. Ore. 1971), *aff'd per curiam*, 491 F.2d 1101 (9th Cir. 1974); *Salerno v. American League*, 429 F.2d 1003, 1005 (2d Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971); *Portland Baseball Club, Inc. v. Baltimore Baseball Club, Inc.*, 282 F.2d 680 (9th Cir. 1960) (*per curiam*). *See also State v. Milwaukee Braves, Inc.*, 31 Wis 2nd 699, 144 N.W.2d 1 (1966), *cert. denied sub nom. Wisconsin v. Milwaukee Braves, Inc.*, 385 U.S. 990.

titrust laws. Congress has had the ruling under consideration but has not seen fit to bring *such business* under these laws by legislation having prospective effect. The *business* has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation . . . . Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, supra,* so far as that decision determines *that Congress had no intention of including the business of baseball* within the scope of the federal antitrust laws." (346 U.S. at 356-67.) (Emphasis added.)

In *Radovich v. National Football League,* 352 U.S. 445, *reh. den.,* 353 U.S. 931 (1957), this Court elaborated on its decision in *Toolson* and repeated in unequivocal terms its ruling as to the inapplicability of the antitrust laws to the business of professional baseball. Explaining its rationale, the Court stated:

> "In *Toolson* we continued to hold the umbrella over baseball that was placed there some 31 years earlier by *Federal Baseball.* The Court did this because it was concluded that more harm would be done in overruling *Federal Baseball* than in upholding a ruling which at best was of dubious validity. Vast efforts had gone into the development and organization of baseball since that decision and enormous capital had been invested in reliance on its permanence. Congress had chosen to make no change. All this, combined with the flood of litigation that would follow its repudiation, the harassment that would ensue, and the retroactive effect of such a decision, led

> the Court to the practical result that it should sustain the unequivocal line of authority reaching over many years." (352 U.S. at 450-51.) (Footnotes omitted.)

In 1972, in *Flood,* the Supreme Court held again that professional baseball is exempt from the antitrust laws. Although the *Flood* case involved an antitrust challenge to Baseball's reserve system, the Court did not confine its holding to that narrow aspect of professional baseball:

> "We repeat for this case what was said in *Toolson:*
>
> "'Without re-examination of the underlying issues, the [judgment] below [is] affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs,* supra, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws.' 346 U.S. at 357." (407 U.S. at 285.)

Congressional action in response to the decisions of the Supreme Court confirms that the business of baseball as a whole is exempt from the federal antitrust laws. As the Court observed in *Flood:* "Since *Toolson* more than 50 bills have been introduced in Congress relative to the applicability or nonapplicability of the antitrust laws to baseball," but none was passed. (407 U.S. at 281.) Based on its thorough review of Congressional action during this period, the Court concluded that it would be improper to alter the antitrust immunity set forth in *Federal Baseball* and *Toolson* because:

> "Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has

> clearly evinced a desire not to disapprove them legislatively."[8] (407 U.S. at 283-84.)

In the six years since *Flood*, Congress has still taken no action on this matter, thereby demonstrating again "by its positive inaction" that it desires "not to disapprove them [the *Federal Baseball*, *Toolson* and *Flood* decisions] legislatively."

In light of this judicial and legislative history, petitioner ultimately concedes that the scope of Baseball's antitrust exemption is far broader than the reserve system and, indeed, encompasses the very practices of the Commissioner challenged in this case. Thus, in the Court of Appeals, petitioner admitted that Baseball's antitrust exemption applies not only to the reserve system, but also applies to:

> "those rules, contracts, agreements and practices which developed during the 50 years following the Court's ruling in *Federal Baseball.*" (Reply Brief of Appellant Charles O. Finley & Co., Inc., p. 30.)

In its Petition to this Court, petitioner concedes that, in addition to the reserve system, Baseball's "historically essential sports practices," developed prior to *Toolson* and in

[8]Congress's clear and consistent refusal to enact any legislation limiting Baseball's antitrust immunity during the 25 years since the 1953 *Toolson* decision overwhelmingly refutes petitioner's contention — raised for the first time in the Court of Appeals and based entirely on selected portions from a 1952 House Committee Report, issued prior to *Toolson* — that Congress intended Baseball to have a severely limited antitrust immunity. Indeed, the report on which petitioner relies expressly recommended "no legislative action" (at p. 232) even though the only existing case at that time was *Federal Baseball*, which held that Baseball was not interstate commerce and that Congress did not intend it to be subject to the antitrust laws. Indeed, the only bills on this matter which have ever passed either house of Congress have been to the effect of approving, rather than repealing, Baseball's antitrust exemption. *See, e.g.*, H.R. 10378, 85th Cong., 2d Sess. (1958) and S. 950, 89th Cong., 1st Sess. (1965).

reliance on *Federal Baseball*, are also exempt from the antitrust laws. (Petition for Writ of Certiorari, pp. 16, 19, 22 (Emphasis omitted.) [hereinafter cited as "Petition, p. ____."].)

Even if this narrow reading were correct, the Findings of Fact adopted by the district court, and affirmed by the Court of Appeals, establish that the practice of the Commissioner of Baseball of disapproving any transaction which he deems "not in the best interests of baseball" — including assignments of player contracts — historically has been viewed as essential for the success and survival of the game and has been among the most vital of the "rules, contracts, agreements and practices which developed following [and in reliance on] the Court's ruling in *Federal Baseball.*"[9]

Thus, having been a well-established precedent long in advance of the *Toolson* decision, the practice of the Commissioner of Baseball of voiding transactions — including assignments of player contracts — as "not in the best interests of baseball," in the exercise of his authority under the game's basic structural agreement, is clearly a "historically essential sports practice" exempt from the antitrust laws even under petitioner's narrow reading of that exemption.

Finally, even though the district court dismissed petitioner's antitrust claim prior to trial, petitioner was still permitted to attempt to show at trial — on the issue of whether the Commissioner's action in this case was ar-

[9]As the Court of Appeals stated:

> "During his almost 25 years as Commissioner [1921-1944], Judge Landis [Baseball's first Commissioner] found many acts, transactions and practices to be detrimental to the best interests of baseball in situations where neither moral turpitude nor a Major League Rule was involved and he disapproved several assignments." (569 F.2d at 537.)

bitrary or capricious — that the Commissioner and/or other Major League club owners were motivated by "the unwholesome business purposes of fixing the price for major league player talent and financially forcing Petitioner out of baseball." (Petition, p. 14.) (Emphasis omitted.)

Petitioner failed completely in this attempt, producing no evidence to support these melodramatic allegations. Upon hearing all the evidence, the district court, affirmed by the Court of Appeals, concluded that the Commissioner's action in disapproving petitioner's attempted assignments of player contracts was based solely on the reasons specified by the Commissioner in his written decision and that the Commissioner acted unilaterally, in good faith and in what he reasonably believed to be the best interests of Baseball. (Findings of Fact, App., pp. 67-69.) Thus, even if the court had not dismissed petitioner's antitrust claim, it would have been compelled by the evidence to conclude that there was no merit to it.

Accordingly, we submit that there is no basis for the Court to review the lower court's unanimous affirmance of the dismissal of petitioner's antitrust claim.

II. THE ADEQUACY OF THE DETAILED FINDINGS OF PROCEDURAL FAIRNESS, AFFIRMED UNANIMOUSLY BY THE COURT OF APPEALS, PROVIDES NO BASIS FOR REVIEW BY THIS COURT

Petitioner also seeks certiorari on the ground that "the District Court made no findings nor conclusions that the Commissioner's action was procedurally fair." (Petition, p. 39.) Simply stated, petitioner's allegation is untrue. The district court made detailed findings of fact and rendered a conclusion of law concerning the fairness of the Commissioner's procedures, as demonstrated by the Court of

Appeals' unanimous affirmance of these findings and rejection of an identical contention by petitioner. (Findings of Fact, App., pp. 67-68; Conclusions of Law, App., p. 70.) In any event, we submit that this issue is not even worthy of certiorari consideration by this Court.

As set forth below, the district court rendered extensive Findings of Fact on the procedural fairness of Commissioner Kuhn's action.[10] Based on these findings, the district court stated in its conclusions of law that the Com-

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[10]The trial court's findings on procedural fairness include the following:

> "48. At the beginning of the scheduled hearing on this matter in the Commissioner's office on June 17, Commissioner Kuhn expressly noted that one of the options available to him was to set aside the assignments. All of the parties took advantage of the opportunity to present what they deemed to be the relevant facts and considerations, including Mr. Finley.
>
> "49. No one in attendance at the hearing, including Mr. Finley, claimed at the hearing that the Commissioner lacked the authority to disapprove the assignments. Moreover, no one objected to the holding of the hearing, or to any of the procedures followed at the hearing.
>
> "50. On the day following the hearing, June 18, 1976, defendant Kuhn reached the conclusion that the attempted assignments of Rudi, Fingers and Blue should be disapproved as not in the best interests of baseball. He then drafted a written decision in which he stated this conclusion and set forth each of the reasons why, in his judgment, the attempted assignments should be disapproved. He sent the decisions via teletype to all interested parties." (Findings of Fact, App., p. 67.)
>
> * * * *
>
> "55. The court finds that Commissioner Kuhn acted in good faith, after investigation, consultation and deliberation, in a manner which he determined to be in the best interests of baseball . . . ." (*Id.* at 69.)

missioner "duly found" the transactions not to be in the best interests of baseball and that the Commissioner's disapproval was "neither arbitrary nor capricious." (Conclusions of Law, App., p. 70.)

The Court of Appeals unanimously held that the district court had provided it with "adequate findings" on the issue of procedural fairness. (569 F.2d at 540.) Indeed, the Court of Appeals noted that petitioner had not even argued to it that "the Commissioner's notice of hearing, the hearing itself, or his written decision with express reasons were procedurally unfair . . . ." (*Id.*, n.45.)

Petitioner's claims that the Commissioner's decision was procedurally unfair because it represented a departure from the past are directly contravened by the express findings of the district court, affirmed by the Court of Appeals as fully grounded in the record evidence. The district court expressly found, and the record fully substantiates, that prior Commissioners had "disapproved several player assignments," that Commissioner Kuhn had previously "taken broad preventive or remedial action with respect to assignments of player contracts," that prior judicial authority had put all parties on notice that the Commissioner's approval of a proposed player assignment was discretionary and not merely ministerial[11] and that petitioner's president had acknowledged in the past his awareness of the Commissioner's authority by requesting the Commissioner to disapprove certain player transactions. (Findings of Fact, App., pp. 58, 60, 65.) In light of these substantiated findings, the Court of Appeals was clearly correct in concluding that all parties to the Major League Agreement had ample notice of the Commissioner's authority and that his actions in this case did not constitute any change in practice. (569 F.2d 537-38.)

[11] *Milwaukee American Ass'n v. Landis*, 49 F.2d 298, 302-03 (N.D. Ill. 1931).

Since the Court of Appeals had no difficulty in reviewing and unanimously affirming the district court's findings of fact on the issue of the Commissioner's procedural fairness, we submit that petitioner's totally unfounded contention that the findings were inadequate provides no basis for review in this Court.

III. THE AFFIRMANCE BY THE COURT OF APPEALS OF THE TRIAL COURT'S LIMITATION OF CROSS-EXAMINATION TO THE SCOPE OF DIRECT WAS CORRECT AND PRESENTS NO ISSUE FOR REVIEW BY THIS COURT

Petitioner asserts that the trial court erroneously excluded evidence with respect to its claim of malice on the part of the Commissioner by improperly limiting its cross-examination of the Commissioner. This contention should be rejected because (1) there was, in fact, no exclusion of any proffered evidence on this issue; (2) the Court of Appeals correctly held that the trial court acted properly and within the scope of its discretion in placing a reasonable limitation on the scope of cross-examination; and (3) the disputed trial court ruling was inconsequential in this case and does not have any significance for any other case.

Petitioner's contention, broadly asserted at least five times in its petition to this Court (Petition, pp. 32, 33, 34, 36, 37) that the trial court "repeatedly" or "consistently" excluded evidence relating to malice is, in plain language, false. Significantly, petitioner never identifies any of the evidence allegedly excluded or the portions of the trial transcript at which the alleged exclusions occurred. The fact of the matter is that petitioner's claim is premised exclusively upon a reasonable limitation placed by the trial court on petitioner's cross-examination of Commissioner Kuhn, restricting the scope of cross-examination to his direct examination.

During its direct case, petitioner was permitted to introduce all proffered evidence with respect to its claim that the Commissioner had acted out of malice toward petitioner when he disapproved his proposed assignments. This proffered evidence included the deposition testimony of the Commissioner which petitioner's counsel had taken concerning prior relations between the Commissioner and petitioner. At the end of respondent's case, Commissioner Kuhn took the stand in his own defense and was not asked any questions on direct examination about his prior dealings with petitioner. During the second day of petitioner's counsel's cross-examination of Commissioner Kuhn, the court sustained an objection to an inquiry into prior incidents between petitioner and the Commissioner. (Trial Transcript 2003.)[12] Apart from this ruling, petitioner's counsel was permitted to conduct vigorous and prolonged cross-examination concerning the Commissioner's state of mind in rendering his decision, concerning each of the reasons set forth in his written decision and concerning all conversations which he had had with anyone (other than counsel) during and after the decision-making process.

In affirming the trial court's ruling on this matter, the Court of Appeals correctly held that:

> "since the subject had not been covered in direct examination, the court in its discretion could restrict the cross-examination to the scope of the direct; and since the subject of malice and motivation had been covered in . . . testimony [of petitioner's president] and in the Commissioner's deposition, the court could exclude it as cumulative regardless of its relevancy." (569 F.2d at 540.)

[12]This was the same ruling which the trial court, at the request of petitioner's counsel, had applied earlier in the trial when respondent's counsel was cross-examining petitioner's president. When respondent's counsel attempted to cross-examine petitioner's president concerning his prior relations with the Commissioner, the court sustained an objection by petitioner's counsel to this line of questioning. (Trial Transcript 811.)

The issue was inconsequential in this case because based on the entire record, including almost two days of petitioner's cross-examination of Commissioner Kuhn, the trial court concluded (and the Court of Appeals unanimously affirmed) that the Commissioner's disapproval of the proposed assignments was made in good faith, without malice and based solely on the reasons set forth in the Commissioner's written decision. It is inconceivable that any further cross-examination by petitioner's counsel into prior, unrelated matters would have had any effect on these conclusions.

Not only was this ruling inconsequential and nonprejudicial in the instant case, but petitioner has not suggested — and we cannot perceive — any significance that this ruling may have in any other litigation. Accordingly, we submit that there is no reason for this Court to review this matter.

IV. A DECLARATORY JUDGMENT THAT FUTURE ENFORCEMENT OF A COVENANT NOT TO SUE IS PERMITTED BY ILLINOIS COMMON LAW PROVIDES NO BASIS FOR REVIEW BY THIS COURT

Finally, petitioner seeks certiorari on a ruling which was not part of the trial of this case and which did not in any way aggrieve petitioner. The Court of Appeals' affirmance of a declaratory judgment holding that in future cases the covenant not to sue contained in the Major League Agreement may, with certain exceptions, be enforced, is not appropriate for review on writ of certiorari in this case because (1) no federal or Constitutional law question is

presented; (2) the lower court's decision simply interpreted a contractual provision under applicable state common law; (3) the decision is consistent with the prior holdings of the Illinois Supreme Court and the rationale of several recent decisions of this Court; and (4) as noted, the decision did not prevent petitioner from obtaining a full-fledged trial on the merits of its claims and will operate only *in futuro.*

In entering a declaratory judgment that the covenant not to sue in the Major League Agreement is valid and may be enforced in the future, the district court found that the covenant "is clear and the results clearly intended." (Memorandum Opinion and Order With Respect to Defendants' Counterclaims, App., p. 80.) The district court relied on evidence which demonstrated that the covenant was adopted knowingly, intelligently and voluntarily by the club owners — sophisticated businessmen and corporations of equal bargaining power represented and advised by counsel — in an effort to promote their self-perceived common business interest. (Trial Transcript 1629, 1644; Trial Exhibits K-82 p. 14, K-89 p. 39, K-91 p. 13, K-95 pp. 9-10.) The district court held that the covenant could be enforced in the future because "[i]t is the law that informed parties, freely contracting may waive their recourse to the courts." (Memorandum Opinion and Order With Respect to Defendants' Counterclaims, App., p. 80.)

Affirming, the Court of Appeals held that an agreement among members of a voluntary association to settle their grievances internally and to avoid litigation is consistent with, and simply reiterates, the governing Illinois common law of private voluntary organizations. (569 F.2d at 542-43.) The Court of Appeals also found that the covenant is consistent with the public policy of Illinois and the many other states which have adopted the Uniform Arbitration Act (Ill. Rev. Stat. Ch. 10, § 101) and consistent with the trend

reflected in recent decisions of this Court as well as many state and lower federal courts.[13]

Petitioner does not (and could not legitimately) contend that the covenant not to sue violates the United States Constitution or any federal statute. Nor does petitioner contend that the challenged covenant prevented it from receiving a full and fair judicial trial on its claims against the Commissioner.

Petitioner's request for this Court to grant a writ of certiorari is premised upon the speculation that other "trade and professional associations," in reliance on the Court of Appeals' holding, may adopt similar covenants which "can and will foreclose their members from challenging any future association action." (Petition, p. 26.) Such speculation presents no basis for review by this Court. There is no evidence in the record that any other association has or is even considering adopting any such provision. Further, it is impossible to speculate on the circumstances surrounding any possible future adoption or enforcement of such a covenant. We submit that, if Supreme Court review of this issue is ever appropriate, it should await a case in which a covenant not to sue has actually been enforced and a party deprived of its opportunity to litigate its claims in court. Only in such a case, will the Court be able to consider the circumstances of the adoption of the covenant, the applicability of the exceptions set forth by the Court of Appeals and the effects of the enforcement of the covenant in the particular case presented.

Moreover, no review by this Court is warranted because the Court of Appeals' decision was correct. The Supreme

[13]The Court of Appeals held that the enforceability of the covenant in the future would be subject to exceptions, where the action by the association is (1) in contravention of the laws of the land; (2) in disregard of the charter or bylaws of the association; or (3) taken without following the basic rudiments of due process of law. (569 F.2d at 544.)

Court of Illinois has consistently, and as recently as 1976, held that "courts . . . will not intervene in questions involving the enforcement of bylaws and matters of discipline in voluntary associations." *Technical Engineers Local 144 v. La Jeunesse*, 63 Ill. 2d 263, 347 N.E.2d 712, 715 (1976); *Werner v. International Association of Machinists*, 11 Ill. App. 2d 258, 137 N.E.2d 100, 108 (1956); *Engel v. Walsh*, 258 Ill. 98, 101 N.E. 222, 223-24 (1913).

Petitioner's sole contention is that such a covenant, regardless of the circumstances surrounding its adoption or enforcement, contravenes public policy. In support of this notion, petitioner relies exclusively on antiquated and inapposite cases decided primarily in the late nineteenth century.[14]

Both the district court and the Court of Appeals were correct that present day public policy, as manifested in relevant statutes and in recent decisions of this Court, favors private agreements which resolve disputes without the cost and delays of litigation. This policy is reflected in the Uniform Arbitration Act, which has been adopted by Illinois and at least 20 other states, and in the United States Arbitration Act, 9 U.S.C. §§ 1-14 (1976). Indeed, this Court has held that the federal arbitration statute controls any state law to the contrary, *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967), and that private agreements to waive all review of an arbitrator's

[14]None of the Supreme Court cases upon which petitioner relies was decided after 1891, and none of the federal cases which petitioner claims conflict with the Court of Appeals decision here was decided after 1934. Virtually all of the petitioner's cases are premised upon the once prevalent, but now thoroughly repudiated, judicial hostility to arbitration agreements. *See, e.g., Owsley v. Yerkes*, 187 F. 560, 563 (2d Cir. 1911); *Tatsuuma Kisen Kabushiki Kaisho v. Prescott*, 4 F.2d 670 (9th Cir. 1925). None of the cases attempts to interpret a freely bargained for contractual provision under contemporary Illinois and federal standards.

decision are valid and enforceable. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519-20, *reh. den.*, 419 U.S. 885 (1974). *See also Rossi v. TWA*, 507 F.2d 404 (9th Cir. 1974), *aff'g per curiam*, 350 F. Supp. 1263 (C.D. Cal. 1972); *Euzzino v. London & Edinburgh Insurance Co.*, 228 F. Supp. 431, 433 (N.D. Ill. 1964).[15]

Two other recent decisions of this Court strongly support the conclusion that public policy in today's world of overcrowded court dockets favors private resolution of controversies without the risks and hazards of protracted litigation. *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In *Overmyer*, this Court upheld the validity of a private contract in which one party agreed in advance of any dispute that in the event of its failure to pay the contractual amount, the party would, if sued, confess judgment, waive all defenses it might otherwise have had to the lawsuit and forego any appeal from the judgment entered against it. The Court held that all of these corporate, property and civil rights may be waived if the waiver is "voluntary, knowing, and intelligently made." (405 U.S. at 185.)

In *Bremen*, this Court upheld a private contractual agreement whereby an American citizen agreed not to sue in any court other than the High Court of Justice in London, England. The Court held that the provision "was made in

[15]Petitioner asserts that the covenant not to sue in the Major League Agreement should be invalidated because it is "repugnant to the salutary maxim that no man shall be the judge of his own case." (Petition, p. 28) The fact is that the Commissioner is not a party to the Major League Agreement. He is the arbiter which the signatories to the Major League Agreement, the 26 major league clubs, have retained to resolve their disputes. By this covenant, the clubs, including petitioner, have agreed among themselves for their self-perceived common benefit to be bound, and to abide fully, by the Commissioner's decisions. Thus, the policies reflected in the state and federal arbitration statutes are fully applicable in this situation.

an arm's length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reasons, it should be honored by the parties and enforced by the courts" which should "give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement . . . ." (407 U.S. at 12.)

In affirming the district court's declaratory judgment in the instant case, the Court of Appeals simply ruled that, in the future, courts may uphold the legitimate expectations of the signatories to the Major League Agreement when they knowingly, voluntarily and willingly agreed to abide by the decisions of the Commissioner and to refrain from challenging his decisions in the courts. We submit that there is no need for this Court to review this clearly correct interpretation of state law, which comports in all respects with present day public policy.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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